No. 83-222

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1983

BORMAN'S INC., Petitioner

v.

ALLIED SUPERMARKETS, INC., Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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BRIEF IN OPPOSITION
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Respondent Allied Supermarkets, Inc., respectfully requests that this Court deny Petitioner Borman's (hereinafter "Borman's") Petition for Writ of Certiorari herein, which seeks reversal of the Sixth Circuit's decision in 706 F2d 187 (1983).

QUESTIONS PRESENTED

1. In a Bankruptcy Act Chapter 11 reorganization proceeding did the Bankruptcy Court abuse its discretionary authority under Section 313(1) of the

Bankruptcy Act, 11 U.S.C., §713 in authorizing rejection of executory agreements with two unions representing the Debtor's (Allied's) employees, where:

a. The unions, Allied's employees and Allied's creditors all were either in favor thereof or did not oppose such rejection;

b. Such rejection of these executory agreements was indispensable to the continued existence of the Debtor and preservation of over 4,000 employee jobs;

c. The opposition of Borman's, a competing supermarket chain, was attributable solely to the fact that in 1977 Borman's, Allied, and a third supermarket chain (Chatham's) had together employed a single labor consultant to negotiate identical but separate 3-year labor contracts for each employer;

d. The Bankruptcy Court's findings and conclusion that the interests of the Debtor and its employees outweighed Borman's competitive

concerns were amply supported by the trial evidence and record?

2. Are the issues herein in any event moot where

a. The 1977 three-year collective bargaining agreements, here invoked by Borman's, in any event expired in March, 1980 and were succeeded by new collective bargaining agreements between respondent and the unions representing its employees;

b. Borman's, moreover, neither requested any stay of the Bankruptcy Court's 1979 order nor tendered any supersedeas bond for a stay; the reorganization plan was approved and put into effect; and there have been resultant substantial and far-reaching expenditures, new agreements and changes of positions and conditions as between the Debtor, its creditors, its employees and their unions;

c. This Court, in any event, is not in a position to grant any effective relief since it is

manifestly impossible to undo the intervening events of the past four years in order to restore the parties to a 1979 status?

3. Is Borman's entitled to yet further review of the Bankruptcy Court decision where it has an adequate remedy at law, and has availed itself thereof by filing a multi-million dollar damage claim against Allied pertaining to Allied's rejection of its executory labor contracts, which damage claim is the subject of separate proceedings pending in the lower courts?

4. Do the issues herein merit review by this Court where no important public question is involved, only an attempt by one supermarket chain to block the chapter 11 reorganization plan of a competitor by opposing an indispensable part of the reorganization plan, and on a contention found to be without merit by all three of the lower courts here?

5. Was the March 31, 1979, Bankruptcy Court decision and judgment invalidated by the fact that, subsequent thereto, the bankruptcy judge accepted an invitation by another union (the Teamsters whose

contract was not involved in the Bankruptcy Court hearing and decision) to appear at 2 Teamster meetings, apparently in response to a membership request for informational purposes, wherein he merely answered rank and file questions as to the nature and effect of Chapter 11 proceedings?

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STATEMENT OF THE CASE

Borman's, Inc., Allied Supermarkets, Inc., and Chatham Supermarkets, Inc., although admittedly "fierce competitors" in the supermarket business, had nevertheless periodically employed a labor consultant, Mr. Jack Bushkin, to negotiate the terms of separate, but like, collective bargaining agreements with the unions representing their employees. The ultimate contracts were separate agreements by each employer and the unions. They eventuated from a procedure wherein Bushkin and the union representatives first met, negotiated the terms of the agreements and prepared a handwritten memorandum thereof signed by Bushkin, by an agent of each of the employers, and by the union representatives. For "convenience" (Joint App. below, p. 104a), the preliminary agreement named "United Supermarket Association" as the employer, this being a non-existent entity and pseudonym utilized by Bushkin to designate the three employers. Upon approval and ratification by the

union membership, this "United Supermarket Association" preliminary agreement was then succeeded by separate contracts, embodying the same employer-employee terms and conditions, but naming and executed only as between the individual supermarket chain and the unions as the contracting parties. (Joint App. below, 99a, 101a.)

All of the contract terms and conditions, both in the preliminary and in the final individual collective bargaining contracts, consisted only of terms and conditions of employment as between employer and employee. None of the agreements contained any lateral provisions, terms or conditions as between the three employers. All of the agreements were for three year terms expiring in March of 1980.

On November 6, 1978, following several years of increasingly unsuccessful business operations, with resultant losses aggregating tens of millions of

dollars[1], respondent Allied Supermarkets ("Allied") filed a petition for arrangement under Chapter 11 of the Bankruptcy Act of 1898 (now repealed and replaced by the Bankruptcy Code, the Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 1101 et seq., which contained a savings clause as to pending proceedings under the Bankruptcy Act).

Thereafter, in March of 1979, following meetings with its creditors and the Creditors' Committee, in an effort to restructure itself into a viable entity, Allied proposed a survival plan (called the "Business Plan") to its employees and creditors. In connection therewith and as a preliminary step to the negotiation

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[1]The undisputed evidence was that Allied had lost some $45,000,000 in a five year period (68a). As a Debtor in possession, its operating losses prior to rejection of its labor contracts averaged approximately $175,000 per week, of which labor costs constituted 65 to 75%; Allied's reorganization plan required closing of unsuccessful store locations; liquidation of certain assets and use of proceeds for modernization and capitalization of others; a two-year wage freeze and other labor contract modifications; rejection of unfavorable leases and other contracts; and all elements of the plan were indispensable conditions thereof (lower court Joint App. 48a, 49a, 81a).

of new collective bargaining agreements with its employees and their unions, Allied petitioned the Bankruptcy Court, pursuant to Section 313(1) of the Bankruptcy Act [11 U.S.C. §713(1)], for leave to reject the existing 1977-1980 collective bargaining agreements.

Borman's and Chatham, the other employers involved in the 1977 bargaining negotiations requested, and were granted, leave to intervene in opposition thereto, and a full evidentiary hearing was then had wherein only Borman's and Chatham opposed Allied's petition (no union, employee or creditor objections were made). Rejection of the 1977 collective bargaining agreements was thereafter authorized by the Bankruptcy Court pursuant to its March 31, 1979, findings and judgment. Allied thereafter filed a plan of arrangement which was approved by its creditors and the Court, and emerged from Chapter 11 status as a reorganized company in October, 1981. It is currently operating at a profit 72 supermarkets (27 in Michigan), a wholesale grocery, and a small drug store business, which together employ some 4,000 people.

Borman's and Chatham appealed to the District Court (Chatham did not, however, join in Borman's subsequent appeal to the Sixth Circuit Court of Appeals). Neither, however, moved for any stay of proceedings nor tendered any supersedeas bond. Accordingly, the reorganization plan, including new collective bargaining agreements, as worked out and agreed to between Allied, its creditors, and the unions representing its employees, was meanwhile put into effect and all of the parties thereto have acted in reliance thereon.

As above noted, the only opposition came from two of Allied's "fierce" competitors in the supermarket business in the Detroit metropolitan area, Borman's, which ranks number one in market share in that area, and Chatham Super Markets, Inc. ("Chatham"), which ranks number two (and which dropped its opposition after the District Court's decision affirming the Bankruptcy Court's ruling).

At the bankruptcy court hearing in March of 1979, Borman's did not offer any testimony as to any

specific adverse effect of rejection of the executory contracts on its business.[2]

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[2]Borman's official annual reports disclose, with respect to its Detroit metropolitan area operations, that as of January 29, 1983, it was operating 85 Farmer Jack supermarkets as against Allied's 27 Great Scott supermarkets in this area. Since the bankruptcy court trial in March, 1979, Borman's enhanced its dominant position by opening 5 new supermarkets, while Allied closed 30 supermarkets in the Detroit area during the same period.

In its annual report for the year ended January 31, 1981, Borman's described in glowing terms expansion plans for the area, its continuing profitability and net earnings, and its optimism for the future despite the "lower labor costs" of a competing chain (i.e., Allied) "under the protection of the Bankruptcy Law."

The comparative income (loss) figures, taken from the published Allied and Borman annual reports for the fiscal years of 1976-1980 clearly negative any material impact on Borman's operations by rejection of the Allied collective bargaining agreements. For the 5 year period of June, 1976 to June, 1980, Allied's net worth decreased from $29,797,000 to a negative (deficit) $8,072,000, whereas Borman's net worth increased from $28,980,000 to $32,006,000. Borman's March 20, 1979, press release (Trial Exhibit 32, Joint Book of Exhibits pp 312e et seq., recited inter alia "record sales," and "eight year earnings high for the 12 week and 52 week periods ended January 27, 1979. By January 29, 1983, according to Borman's latest annual report, it reported record sales of over a billion dollars, profits of over 7 million dollars (in part attributable to a newly negotiated wage freeze and other labor concessions agreed to by its employees), and a net worth of over 35 million dollars.

Their chief witness was Dr. Mark Kahn, Professor of Economics at Wayne State University, who hypothesized that wage concessions obtained by Allied from its employees could have an adverse effect on the profits of its competitors, but admitted that he had not investigated the actual financial condition of any of the 3 companies.

The Bankruptcy Judge noted (Joint App. below, 260a) that the 1977 collective bargaining agreements with the unions did not constitute a labor contract "as between Borman, Allied and Chatham;" that under Section 313 of the Bankruptcy Act the Court's primary responsibility was to ascertain the nature and extent of the burden to the Debtor of the executory agreements, and to weigh the equities of, and the consequences to, Allied and its employees in connection therewith (Joint App 260a et seq.); and the finding and conclusion of the Bankruptcy Judge was that the equities of Allied and its employees, particularly in light of the imminent loss of 4,500 jobs by Allied employees, outweighed the Borman and Chatham competitive concerns (266a-270a).

The District Court affirmed the decision of the bankruptcy court's order authorizing rejection of the Allied collective bargaining agreements and Borman's then prosecuted its appeal to the Sixth Circuit Court of Appeals. [There the unions, as well as the Allied Creditors Committee, filed amicus curiae briefs in support of the Bankruptcy Court and District Court decisions.]

In the interim Borman's also sued unsuccessfully in the District Court for an injunction to block the union representing Allied's employees from entering into any new agreements to replace the 1977-1980 collective bargaining agreements. (Borman's, Inc. v Retail Store Employees Union, etc. U.S.D. C. (E.D. Mich) Civil Action No. 79-70974). Following denial of its request for an injunction, Borman's stipulated to dismiss that suit with prejudice.

Borman's also filed charges with the National Labor Relations Board against Allied, alleging unfair labor practices. The NLRB declined to issue a complaint or act thereon.

As to Borman's claim that Allied's petition to reject its the 1977-1980 executory collective bargaining agreements constituted a breach of an alleged 1977 multi-employer agreement, the Bankruptcy Act (§353) permits a party to a contract rejection to file a damage claim against the Debtor. Borman's availed itself of this right, and filed a $6,474,963 damage claim against Allied in its Chapter 11 proceeding relative to the events before this Court. This claim was tried before Bankruptcy Judge George E. Woods. On August 12, 1983, in a careful and detailed opinion, Judge Woods found that there was neither any express nor any implied agreement between the three employers which precluded any of them from subsequent negotiation of collective bargaining agreement modifications or changes:

> "In summary, it is the ruling of this Court that the 1977 memoranda and the resulting collective bargaining agreements with the Meat Cutters and Retail Clerks do not constitute an express contract among Allied, Borman's and Chatham. It is further the conclusion of the Court that Borman's has failed to show that an implied in-fact contract existed among itself,

> Allied and Chatham to pay identical wages and benefits to the Meat Cutters and the Retail Clerks, throughout the term of the collective bargaining agreements...."

* * * *

> "The objection of Allied is sustained; the claim of Borman's is disallowed."

Borman's has appealed that decision to the U.S. District Court.

SUMMARY OF ARGUMENT

The evidentiary record before the Bankruptcy Judge amply justified his conclusion (Joint Appendix below p. 268a, emphasis added) that:

> ". . .The Court specifically finds that no testimony demonstrates here that the equities in favor of rejection, at least insofar as the welfare of the members of these bargaining units, whether they be employees of Chatham, Borman or Allied, it (rejection) is in their best interest and the equities preponderate on the side of rejection, not on the side of refusal to reject."

No dispute here exists between employer and employee, or any union representing employees, as to rejection of the subject 1977 collective bargaining

agreements; hence contentions as to whether the standards for rejection should be "strict" standards to protect employees' benefits, or the customary Bankruptcy Act standard as to whether the executory contract is onerous or burdensome to the Debtor, is irrelevant. Neither approach contemplates utilization thereof by a competitor of the Debtor to obstruct the Debtor's reorganization and thus eliminate competition, with total indifference to the resultant destruction of the jobs of the Debtor's employees.

Here, moreover, the issues are moot since (a) the subject (1977) collective bargaining agreements expired in March of 1980, and have been replaced by new collective bargaining agreements between Allied and its employees, as to which Borman's is not, and does not claim to be, a party; (b) petitioner Borman's sought no stay and filed no supersedeas bond to halt implementation of either Allied's court-approved business restructuring or its court-approved plan of arrangement with its

creditors; (c) Allied's business restructuring and reorganization plan has been in effect for some four years and there have been substantial expenditures, changed positions, new contracts, and new rights and obligations created upon the part of Allied, its creditors, its employees, and their unions in reliance thereon. In short there is no effective relief this Court could grant at this point even if the Bankruptcy Court decision authorizing rejection of the labor contracts were to be deemed erroneous. Nor does Borman's suggest any.

In any event, the Bankruptcy Act provides Borman's with an adequate remedy for damages for any alleged breach of contract; and Borman's has availed itself thereof by filing a multi-million dollar damage claim against Allied. While it has, to date, failed to establish the validity of that claim in the trial thereof below, it clearly is having its day in court for redress of any monetary injuries it claims to have suffered.

This controversy (a one-of-a-kind situation between Allied and a competitor) is not such as to merit review by this Court at this time nor, indeed, is there any effective relief which this Court could now grant.

ARGUMENT

I. Allied's participation in a multi-employer bargaining arrangement in 1977 did not preclude its statutory right, in subsequent Bankruptcy Act Chapter 11 reorganization proceedings, to petition the bankruptcy court for authority to reject onerous executory collective bargaining agreements.

Section 313(1) of the Bankruptcy Act of 1898, the section here involved, authorized the Bankruptcy Court to

> " . . . permit the rejection of executory contracts of the Debtor, upon notice to the parties of such contracts and to such other parties in interest as the Court may designate." 11 U.S.C. § 713(1)

The underlying statutory policies and purpose are familiar, and have been summarized as follows (Collier On Bankruptcy, 14th Ed, Vol 14 at page 11-53-3 emphasis added):

"The underlying policy behind the scheme of Chapter XI is that a debtor, in precarious financial condition, be given an opportunity to come to an agreement with its unsecured creditors and thereby to emerge from the bankruptcy court as a rehabilitated debtor, still viable in the commercial world. In consequence of this policy, Section 313(1) of the Act confers upon the bankruptcy court jurisdiction to permit the rejection of the debtor's executory contracts.

> "The power given by Section 313(1), as implemented by this Rule 11-53, is a broad power, broader in the context of a Chapter XI case than in a Chapter X case. Thus, in Chapter XI, there would appear to be no limitation as to the kind of executory contract that may be rejected by the debtor under the authority of Section 313(1). It will be sufficient that there is indeed a contract which remains executory, or aspects of which remain executory, and that appropriate circumstances warrant rejection. While Section 313(1) does not make mandatory the rejection of executory contracts, that determination is left to the discretion of the court but without a description of the circumstances to warrant the exercise of the court's power. It would seem that that power should be exercised where rejection of the contract would be of advantage or benefit to the debtor. Thus, where the contract is detrimental and where requiring the debtor to continue to abide by it would be onerous and burdensome, the court should exercise its discretion favorably and permit the rejection so that the debtor may, free of the burdensome contract, continue in the scheme of Chapter XI to rehabilitate itself and to emerge from the court. Accordingly, the grant in Section 313(1) is broad and

> unfettered and reflects no inhibition as to the type of contract which it may reject as is shown in Section 116(1) of the Act in Chapter X cases. Accordingly, collective bargaining agreements governed by The National Labor Relations Act may be rejected within the meaning of Section 313(1) upon a showing that such contracts are onerous and burdensome and 'that the equities tip decidedly in favor of termination.' "

The same public policy has been reenacted and reaffirmed by Congress in the new Bankruptcy Code, 11 U.S.C. §§ 365 and 1107.

Here, it is noteworthy that Borman's petition for writ of certiorari does not deny that the Bankruptcy Court did have jurisdiction and discretionary authority under Section 313(1) of the Bankruptcy Act to authorize rejection of a collective bargaining agreement. Borman's only argues (Petition, p. 19) for applicability of the so-called "strict standards" doctrine which had been applied in several Second Circuit cases in the context of an employer-employee dispute.

Where, as here, however, there is no employer-employee dispute, the employees (and the unions representing them) here being in agreement with the

Debtor, Borman's argument is we submit patently inapplicable and specious. Thus, nowhere does Borman's generalization as to the "stricter standards", to be weighed by a bankruptcy court in the exercise of its Section 313(a) discretionary authority in an employer-employee dispute, disclose how that would justify an objection by the Debtor's competitor, aimed only at blocking an integral part of the Debtor's reorganization and survival plan; or how such "strict standards" would give that competitor Section 313(1) status and equities superior to those of both the Debtor and its employees.

A. The Bankruptcy Court's findings of fact, not only as to the onerous and burdensome nature of the 1977 collective bargaining agreements but also as to the superior equities of the Debtor and its employees vis-a-vis Borman's, were not "clearly erroneous" but, on the contrary were amply supported by the record, and were therefore properly upheld by the successive appellate courts below.

Rule 810 of the Rules of Bankruptcy Procedure provides that, on appeal, "the Court shall accept the

referee's findings of fact unless they are clearly erroneous, and give due regard to the opportunity of the referee to judge the credibility of the witness."

This "clearly erroneous" standard of review means that the findings of the Bankruptcy Judge should not be disturbed "unless there is most cogent evidence of mistake and miscarriage of justice." Matter of Roark, 28 F.Supp 515 (E.D. Ky. 1939), citing Kowalsky v American Employers Ins. Co., 90 F2d 476 (6th Cir 1939); Fidelity Mortgage Investors v Camelia Builders, Inc (2d Cir, 1976), 550 F2d 47,51, cert den 429 US 1093, 51 L Ed 2d 540, 97 S Ct 1107, reh den 430 US 976, 52 L Ed 2d 372, 97 S Ct 1670; Matter of Coil, 680 F2d 1170 (7th Cir, 1982). Put another way, before the judgment of the Bankruptcy Judge may be reversed, the appellate court must find that no testimony exists in support of it, or that the Bankruptcy Judge has acted arbitarily or capriciously, vol. 2A, Collier on Bankruptcy, 14th ed., ¶ 39.28, at p 1538. That, of course, is not the case here.

Here, on the contrary, the following clearly relevant findings of fact by the Bankruptcy Court were amply supported by the testimonial record herein:

> a. "It has been recounted how within the last four years, approximately four years, there has been some $43 million[4] in losses (at Allied)." (264a).
>
> b. "The testimony shows here, indeed, and I have to accept it, it is uncontroverted that [since the inception of these Chapter XI proceedings] there are losses of $173,000.00 per week [at Allied]." (264a).
>
> c. "The testimony clearly shows here that approximately 75 -- 65 to 70 percent of the Debtor's cost of operation is attributable for labor, the cost of labor." (265a).
>
> d. "Based upon what the Court has heard here by way of testimony as to the financial plight and the losses being suffered by this Debtor, it would place this Debtor's future existence and continued existence in considerable peril [if the collective bargaining agreements are not rejected] or, at the very least, it would appear from that testimony that it would impose unnecessary losses upon the secured and unsecured creditors of this estate. . . . The Debtor has assured the Court, and I think the testimony, it is there, I can't change it, it is recorded, the die is cast, that if these contracts are not rejected, that this Debtor will eventually become the victim of liquidation. It will no longer exist as a going business." (262a, 265a-266a)

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[4]Actually approximately $45,000,000 (68(a).

e. ". . . without rejection of the three bargaining units [contracts], there will be 4,500 jobs less if the Court doesn't reject." (268a).

The foregoing factual findings are amply sufficient to support the Bankruptcy Court's order even assuming applicability here of the so-called "strict standards" decisions of the Second Circuit in the cases invoked by Borman's.

B. Nor did the 1977 preliminary collective bargaining agreements between Borman's, Allied, Chatham and their respective employees contain any provision prohibiting subsequent Chapter 11 reorganization proceedings and exercise of Bankruptcy Act Section 313 rejection rights. Moreover, any such contractual provision itself would still be an executory agreement subject to Section 313 rejection authorization.

As hereinbefore noted, the basis upon which Borman's asserts its alleged right to oppose Allied's rejection of its executory collective bargaining agreements with the unions representing its employees is that in 1977, as in prior years, Borman's, Allied and Chatham had collectively negotiated identical three-year collective bargaining

agreements with the unions, pursuant to the preliminary agreement negotiated by Bushkin under the pseudonym of "United Supermarket Association."[5]

The preliminary United Supermarket Association collective bargaining agreements did not in fact contain any lateral or other stipulations, terms or conditions as between the three employers, and [as noted in Judge Wood's decision, infra, p 9 hereof] in no way prohibited each of the three employers from thereafter dealing with their employees or the unions with respect to their separate employer-union contracts. In any event, assuming arguendo that some such stipulation could be read into the

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[5]Since the separate final agreements executed separately by each of three employers included all of the terms and conditions contemplated by the preliminary "United Supermarket" agreement, were complete within themselves, and included all the terms of the preliminary agreement, they thereby in any event constituted integration, merger and replacement of the preliminary "United Supermarket" documents, Kintz v Galvin, 219 Mich 48 at page 52, 88 NW 408 (1922); Sharon v Spalding School District 370 Mich 342 at page 349, 121 NW 2d 847 (1963); Restatement of Law, Contracts, 2d Ed vol 2 §§209, 210 and 213.

preliminary 1977 multi-employer bargaining agreement, that agreement was no less an executory agreement, subject to the same statutory (§ 313) debtor right to reject, as any other executory agreement which is deemed by the debtor and found by the Bankruptcy Court to be burdensome to the debtor and harmful to the debtor's reorganization plan.

II. The issues herein are doubly moot since (a) the 1977 collective bargaining agreements in any event expired in March, 1980; and (b) Borman's petition neither requested any stay nor tendered any supersedeas bond for any stay of proceedings; the reorganization plan was therefore placed into operation with resultant performance, expenditures, new contracts and changes of position, by Allied, its creditors, its employees and the unions. Consequently there have been irreversible changes in position by thousands of persons and thus there is no effective relief this Court could grant at this time even should the Bankruptcy Court decision be deemed erroneous.

A. Mootness by virtue of contract expiration.

There is not, and has not been, any issue herein between Allied and its employees and their unions concerning any of the terms or conditions of the

collective bargaining agreements which expired in March of 1980. Claims, if any, which might have been asserted thereunder are therefore purely hypothetical and moot. National Bible Knowledge Ass'n, Inc. v Dumont Broadcasting Corporation, 237 F2d 74 (D.C. Cir., 1956); International Brotherhood of Teamsters v Deaton Truck Line, Inc., 307 F2d 748 (5th Cir., 1962); NLRB v Cosmopolitan Studios, Inc., 291 F2d 110 (2nd Cir., 1961); Shank v NLRB, 260 F2d 444 (7th Cir., 1958).

As hereinbefore noted, Borman's petition for writ of certiorari herein is notably silent as to just what would be accomplished by yet a further review, at this time, of the Bankruptcy Court's order authorizing rejection of these long since expired collective bargaining agreements. Certainly, there is no way (nor does petitioner suggest any) whereby the parties can be restored to a 1979 status which, even then, would have been operative only for the remaining twelve months of the 1977 agreements.

B. Mootness by virtue of Borman's failure to request a stay of proceedings or tender a supersedeas bond.

The no-risk tactics evidenced by Borman's appeal of the Bankruptcy Court's decision without any stay or any supersedeas bond is indicative of the mischievous nature of its intervention and opposition to a reoganization plan approved by all validly interested parties. By electing this no-risk approach, however, Borman's thereby also permitted the reorganization plan, including negotiation of new labor and other agreements, to be placed in effect and performed. Thereby, Borman's objections and issues,predicated upon the 1979 status of the parties, became moot.

In re Roberts Farms, Inc., 642 F2d 371 (9th Cir, 1981)

Country Fairways, Inc. v Mottaz, 539 F2d 637 (7th Cir, 1976)

In re Cantwell, 639 F2d 1084 (3rd Cir, 1981)

Matter of Combined Metals Reduction Co., 557 F2d 179 (9th Cir 1977)

Valley National Bank of Arizona v Trustee, 609 F2d 1274, 1283 (9th Cir 1979)

In re Income Property Builders, Inc., 699 F2d 963 (9th Cir, 1982)

In re National Homeowners Sales Service, 554 F2d 636 (4th Cir, 1977)

Scolnick v Connecticut Telephone and Electric Corp., 265 F2d 133, 136 (2nd Cir, 1959)

As stated in Roberts Farms, supra, at page 376:

"In the field of the administration of estates under the bankruptcy laws, the policy of the law strongly supports a requirement that a stay be obtained if review on appeal is not to be foreclosed because of mootness.

* * *

"Were we to deny the motion to dismiss for mootness and on consideration of the merits reverse the order of the District Court, what would be the result? Are we not quite patently faced with a situation where the plan of arrangement has been so far implemented that it is impossible to fashion effective relief for all concerned? Certainly, reversal of the order confirming the plan of arrangement, which would knock the props out from under the authorization for every transaction that has taken place, would do nothing other than create an unmanageable, uncontrollable situation for the Bankruptcy Court.

> '. . . when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatsoever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence.'

Mills v Green, 159 U.S. 651, 16 S. Ct. 132, 40 L. Ed. 293 (1895). This appeal should be dismissed for mootness.

> "An entirely separate and independent ground for dismissal has also been established because appellants have failed and neglected diligently to pursue their available remedies to obtain a stay of the objectionable orders of the Bankruptcy Court and have permitted such a comprehensive change of circumstances to occur as to render it inequitable for this court to consider the merits of the appeal. The touchstone precedent for this principle is Valley National Bank of Arizona v Trustee, 609 F2d 1274 (9th Cir, 1979). There our court held that the failure to seek stays coupled with a substantial change of circumstances would justify dismissal of the appeal for lack of equity. [642 F2d at 374-376; emphasis added]

Where, as here, it is manifestly impossible to revert to a 1979 status under contracts long since expired, this Court does not customarily take

jurisdiction to engage in academic discussions or render advisory opinions. As this Court declared in North Carolina v Rice, 404 US 244, 30 L Ed 2d 413, 92 S Ct 402 (1971, emphasis added):

> "To be cognizable in a federal court, a suit must be definite and concrete, touching the legal relations of parties having adverse legal interests, and it must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Similarly, Rosario St. Pierre v United States of America, 319 US 41 87 L Ed 1199 (1943):

> "A Federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it."

III. Borman's has an adequate remedy at law and has availed itself thereof by filing a multi-million dollar claim against Allied in separate proceedings still pending in the lower courts.

If, arguendo, some contract or agreement in fact here existed in favor of Borman's which was breached by Allied's Chapter 11 rejection of its

executory labor contracts, Section 353 of the Bankruptcy Act (11 U.S.C. §753) gave Borman's a legal remedy therefor in the form of a right to file a claim for any such damages as a creditor of the Debtor. Here Borman's did in fact file such a claim; the claim has, in fact, already been tried; was found by the trial judge to be without merit; and Borman's appeal of that decision is presently pending in the U.S. District Court (see infra, p 9 hereof). Thus, Borman's was provided by the Bankruptcy Act with an adequate remedy at law, did avail itself thereof, and does not have a right to seek yet further review of the controversy by this Court.

IV. The issues in NLRB v Bildisco are totally dissimilar, and afford no justification for Borman's attempt to piggyback its petition here upon that case.

The case asserted by Borman's as "similar," and therefore justification for its petition here, is NLRB v Bildisco, 682 F2d 72 (3rd Cir 1982, cert. granted _____ US _____ 103 S Ct 784, 74 L Ed 2d 992

(1983). In fact, however, that case is totally dissimilar. There, both the NLRB and the union opposed the debtor's petition for rejection of the collective bargaining agreement, and the issues which this Court agreed to review were issues and equities solely between the employer and its employees. Here, on the contrary, not only were the unions in accord with Allied's Section 313 petition (or, at least, offered no objection thereto and subsequently opposed Borman's in all of its efforts to challenge the Bankruptcy Courts approval of the rejection of the labor contracts), but the NLRB also rejected Borman's request for an NLRB unfair labor practice charge against Allied.

Thus, Borman's contentions here are completely inapposite to the issues in Bildisco; and review of the mooted issues in this cause, arising only as between two competing supermarkets, would be totally irrelevant to the issues to be addressed by this Court in Bildisco.

V. The issues herein do not merit review by this Court where no important public question is involved and the case only involves narrow facts wherein a competitor of a Chapter 11 Debtor sought to block its reorganization plan, thereby eliminating competition.

As herein noted by the Court of Appeals, 706 F2d at page 190, supra:

> "Borman cites no case holding that the interest of a debtor's competitor in holding the debtor to the terms of the labor contract negotiated by the multiemployer bargaining unit is also to be weighed. As a practical matter, the interest of the employees, represented by the unions, and the interest of Borman in the application simply are not comparable."

It is, we submit, readily apparent that the Borman's contentions are not in furtherance of the objectives of either the National Labor Relations Act or the Bankrupty Act's Chapter 11 provisions for preservation of a financially troubled debtor as a viable business enterprise and employer.

No employer-employee dispute is here present nor is there any debtor-creditor dispute and, as noted by the Sixth Circuit, supra, Borman's cites no case supporting its contention; thus this case does not even present any question of a conflict in lower court decisions requiring clarification by this Court.

Accordingly, all that is here presented is a narrow argument, asserted for an inappropriate purpose, in a long since mooted case, by a competitor of a Chapter 11 reorganization petitioner; and serving no real purpose other than Borman's self-serving interest in obstructing the reorganization and survival of a competitor.

We respectfully submit that such an application falls far short of the "special and important reasons" contemplated by Supreme Court Rule 17 as the justification for certiorari; that Rule implies issues "beyond the academic or the episodic," Rice v Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 90 L Ed 897, 75 S Ct 614 (1955); NLRB v Pittsburgh Steamship Co., 340 U.S. 498, 95 L Ed 479, 71 S Ct 453 (1950). As stated in Pittsburgh Steamship, supra:

> "Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.'"

Also relevant here is Professor Griswold's recent article in Judicature (Journal of the American Judicature Society, vol 67), Number 2, August 1983, pp 5-8 et seq: "Helping the Supreme Court by reducing the flow of cases into the Courts of Appeals."

VI. The bankruptcy judge's voluntary appearance at union meetings after both the bankruptcy hearing and the judgment herein, at the request of a union whose contract was not the subject of the above rejection hearing or judgment, merely for informational purposes (to answer membership questions as to the nature and effect of this Chapter 11 proceeding), is a spurious, straw man issue, irrelevant to this case.

This contention of Borman's is predicated upon the depositions of two union officers, taken by Borman's in another case where Allied was not a party, and injected by Borman's as part of the appellate record in this cause. Borman's had instituted suit against Retail Store Employees Union Local No. 876, AFL-CIO (district court civil action No. 79-70974) in an effort to enjoin that union from negotiating a new collective bargaining agreement

with Allied. The requested injunction was denied, and Borman's thereafter dismissed the suit with prejudice.

During the pendency of that suit Borman's had taken the depositions of two Teamster officers, Lawrence Brennan and Robert F. Holmes, concerning two Teamster meetings held subsequent to the bankruptcy court opinion and order. As Allied was not a party to that suit it received no notice of either of the depositions, and was not present thereat (Lower Court Joint Book of Exhibits pages 317e and 357e). Both depositions indicated that Bankruptcy Judge Hackett had voluntarily appeared at those meetings between April and June of 1979 to answer membership inquiries concerning the nature and effect of the Chapter 11 proceedings and the bankruptcy court order; and that was the entire extent of his participation.

The prior March 31, 1979, findings and judgment of the bankruptcy court rested upon the record, testimony, contentions and briefs then and

theretofore presented by the parties, including Borman's. Judge Hackett's subsequent s willingness, to appear at a meeting held by the members of another union, whose contract was not the subject of the above mentioned hearing or decision, for merely informational purposes in response to union rank and file questions, in no way affected his prior decision. That later occurrence was no part of the trial and decision here, is clearly a spurious straw man issue, and was properly disregarded in the successive appellate decisions of the U.S. District Court and the Sixth Court of Appeals herein.

CONCLUSION

In this Section 313(1) proceeding under the Bankruptcy Act of 1898 by a debtor seeking reorganization under Chapter 11 of that Act, the three lower courts herein were clearly correct in treating the interests of the Debtor and its employees as the dominant interests for consideration, as against objections by competitors of

the Debtor which, if sustained, would have ended the existence of the Debtor and the employment of 4,500 of its employees.

The issues moreover arose only as to collective bargaining agreements which, in any event, expired in March of 1980, and which therefore can in no event be reinstated, extended or enlarged to any present or future period. Nor did Borman's seek any stay of proceedings or tender any supersedeas bond to stay the immediate implementation of either Allied's business restructuring plan or its Chapter 11 reorganization plan as approved by the Debtor, its creditors, the unions representing its employees, and by the Bankruptcy Court.

Clearly there is no way that this Court can extinguish or undo the business dealings and events of the past four years and restore all parties to a 1979 contractual status which, even then, had only a short period to go. Significantly, Borman's petition for certiorari is wholly silent as to the relief to be

granted even if this Court should disagree with the successive factual findings and legal conclusions of the courts below.

In any event Borman's was provided with an adequate remedy at law by Section 353 of the Bankruptcy Act, supra, and has availed itself thereof. In fact, as heretofore noted, Borman's has resorted to a variety of legal maneuvers in its effort to block or hamper Allied's Chapter 11 reorganization plan (e.g., Borman's unfair labor charges to the NLRB; its injunction suit against Local 876 of the Retail Store Employees union; its intervention and opposition in the Chapter 11 proceedings herein; and its six million dollar damage claim against Allied). The Bankruptcy Court, the District Court, and the Sixth Circuit Court of Appeals have all found the Borman claims to be without merit.

We respectfully submit that the narrow, wholly personal claims here advanced by this competing

supermarket chain, unsupported by any decision in any court, do not warrant intervention by this Court.

Respectfully submitted,
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